

**STATE INDIRECT PURCHASER LITIGATION AND U.S.
ANTITRUST ENFORCEMENT**

TESTIMONY BEFORE THE ANTITRUST MODERNIZATION COMMISSION

By

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**JUNE 27, 2005
WASHINGTON, D.C.**

Members of the Antitrust Modernization Commission, thank you for the opportunity to address the Commission on the subject of the role of state indirect purchaser litigation in the U.S. antitrust enforcement system.

From the perspective of an antitrust litigator with a defense practice, I believe that the Supreme Court got it right in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977) (“*Illinois Brick*”). Direct purchasers from antitrust violators are the far more efficient enforcers of the antitrust laws. The complexities of the apportionment of damages, and the inherently speculative nature of the quantum of injury that purchasers remote from the antitrust violation itself may have incurred, require that Congress should dictate that the rule of *Illinois Brick* preempts state indirect purchaser lawsuits. In the alternative, Congress should consider permitting an indirect purchaser claim under federal law, where the underlying antitrust claim is criminal and therefore a *per se* offense under the Sherman Act.¹

This conclusion is not changed by the passage of the Class Action Fairness Act of 2005. That statute will take indirect purchaser litigations out of the multiple state courts in which they have been prosecuted and into a single federal forum, and there are certainly many advantages to that change from a cost and efficiency standpoint. But the problems that the Supreme Court identified in *Illinois Brick* that arise from multiple layers of antitrust plaintiffs attacking the same

¹ Indirect purchaser litigation today also involves claims in federal court brought under the Sherman Act by remote purchasers seeking to establish exceptions to the rule of *Illinois Brick*. The federal courts have generally held that purchasers from a retail price fixing conspiracy are direct purchasers, and therefore may maintain their claims against either the middlemen or the manufacturer/conspirators or both. *See, e.g., In re Brand Name Prescription Drugs Antitrust Litig.* 123 F.3d 599, 609 (7th Cir. 1997). However, dealers may be subject to an agreement held to violate the antitrust laws but still may have a claim against their sellers under *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968). Unless they are joined as defendants in the same action as their manufacturer, and found to be “equal and voluntary participants” in a conspiracy, the risk of duplicative recovery and apportionment remain. There is continued litigation on this issue and the law is not a model of clarity. The extent of other “exceptions” to *Illinois Brick*, such as the control exception, or the cost plus exception, remains unsettled. The scope of indirect purchaser claims under federal law is outside the realm of the Commission’s questions for this panel.

defendant for the same conduct will remain and perhaps intensify as a result of the new statutory scheme.

A brief review of *Illinois Brick* and its policy underpinnings is necessary to an understanding of the dynamics of indirect purchaser litigation today. In *Illinois Brick*, the plaintiffs alleged that defendant concrete block manufacturers conspired to fix prices of concrete block that the defendants sold to masonry contractors. Plaintiffs alleged that the masonry contractors had “passed on” the overcharges resulting from the price-fixing conspiracy among concrete block manufacturers to general contractors, who then passed on the overcharges to plaintiffs, who had purchased buildings made from the concrete block. Plaintiffs, therefore, were “indirect purchasers” of concrete block, which “passes through two separate levels in the chain of distribution before reaching” them. *Id.* at 726.

The issue before the Court was whether indirect-purchaser plaintiffs could use this “pass on” theory to state a damage claim against an alleged antitrust violator. The Court previously had held that an antitrust defendant could not argue that a plaintiff who had purchased a product directly from the defendant was not injured because it had “passed on” the illegal overcharge to its own customers. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968). To maintain consistency, the Court held in *Illinois Brick* that direct purchasers are the only parties “injured” in a manner that permits them to recover damages under Section 4 of the Clayton Act. 431 U.S. at 724.

The Court gave three policy reasons for its holding: (1) a serious risk of multiple liability for defendants and potentially inconsistent adjudications could arise if both direct and indirect purchasers were permitted to sue defendants for the same overcharge; (2) the significant evidentiary complexities and uncertainties involved when indirect purchasers attempt to

demonstrate the portion of the overcharge that their sellers had passed on to them would place too great a burden on the courts; and (3) that permitting indirect purchasers to sue would result in the inefficient enforcement of the antitrust laws by diluting the ultimate recovery and decreasing the direct purchaser's incentive to sue. *Id.* at 732-33. Thus, the Court held that "the overcharged direct purchaser, and not others in the chain of manufacture or distribution, is the party 'injured in his business or property' within the meaning of the [Clayton Act]." *Id.* at 729.

The question for this Commission to address is whether these considerations remain so fundamentally correct that it should recommend the elimination of state indirect purchaser litigation, or whether developments in the ability of the courts to manage complex cases in the ensuing 28 years means that the Court's cautious analysis of the burdens placed on them is no longer relevant, and therefore the protection of *Illinois Brick* is no longer necessary.

Question 1: The Costs and Benefits of Indirect Purchaser Litigation

The costs of indirect purchaser litigation in the first instance relate to the tremendous complexity of dealing with groups of indirect purchaser plaintiffs who are proceeding under the separate laws of fifty states. This complexity not only increases the costs and burdens of the litigation through the repetitive litigation of the same issue in multiple jurisdictions. It also greatly complicates the risk analysis from the defense perspective since there are conflicting interpretations of the scope and extent to which indirect purchasers may maintain claims in any given state, and the landscape is constantly changing. The costs of litigating these substantive issues is compounded by the fact that indirect purchaser plaintiffs in different states are most frequently represented by different groups of counsel, each separately prosecuting identical claims against the same defendants.

Today, the ability of indirect purchasers to bring a claim under a particular state antitrust law is hugely complicated. In something less than half of the states, a statute specifically provides indirect purchasers with a cause of action. But judicial interpretations of those statutes that long predated *Illinois Brick* had limited the reach of the original law to violations “intrastate” in character. *See, e.g., State v. Phipps*, 31 P. 1097, 1098 (Kan. 1893) (holding that “the word trade . . . means . . . trade between citizens of this state - - domestic trade . . . and not trade or commerce between citizens of different states, or interstate commerce”); *Standard Oil Co. v. State*, 65 So. 468, 471 (Miss. 1914) (determining that “a conspiracy to monopolize trade in any commodity to be punishable under state laws must have as one of its objects a monopoly in the intrastate trade therein to be accomplished in part at least by transactions which are also wholly intrastate”), *overruled in part on other grounds sub nom., Mlandinich v. Kohn*, 164 So. 2d 785 (Miss. 1964); *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 147 N.W. 1058, 1062 (Wis. 1914) (“The contract we think involved interstate commerce, and if so the federal statute is applicable and the case will be treated on that basis.”). Plaintiffs have been chipping away at this intrastate limitation with some degree of success. *See, e.g., Sherwood v. Microsoft Corp.*, No. M2000-01850-COA-R9-CV, 2003 WL 21780975 (Tenn. Ct. App. July 31, 2003); *Olstad v. Microsoft Corp.*, 679 N.W. 2d 548 (Wis. 2004) (granting certification of question). Thus, there is a degree of uncertainty as to whether consumer plaintiffs may maintain an antitrust claim in a case that arose in an interstate context even in states that have a so-called “*Illinois Brick* repealer” statute.

Indirect purchasers have also successfully argued that they may maintain a claim under the state antitrust act, even where the statute does not contain a specific amendment permitting such a claim. In Arizona, Iowa, and Nebraska, for example, the state Supreme Courts have

recently held that indirect purchaser plaintiffs can proceed under the state antitrust statute, despite the fact that the legislature has not passed a repealer amendment. *Bunkers Glass Co. v. Pilkington plc*, 75 P.3d 99, 102-04 (Ariz. 2003); *Comes v. Microsoft Corp.*, 646 N.W. 2d 440, 446-47 (Iowa 2002); *Arthur v. Microsoft Corp.*, 676 NW. 2d 29, 37 (Neb. 2004). As another example, the West Virginia Antitrust Act does not contain a repealer, and provides that it must be construed “in harmony with ruling judicial interpretations of comparable federal antitrust statutes.” Section 47-18-16. Nevertheless, the West Virginia Attorney General has issued a legislative ruling providing for indirect purchaser claims (W. Va. Code St. R. 142-9-2) and that ruling was approved by the West Virginia legislature. (S.243 Reg. Sess., at 1023 (W.Va. 1990) (enacted)).

Currently, the most hotly contested issue in indirect purchaser litigation is whether an indirect purchaser plaintiff in a state without a repealer statute, or a judicial interpretation of its antitrust statute that permits such a claim, may bring an action under state consumer protection act statutes. The consumers argue that the conduct that gives rise to antitrust claims for direct purchasers under federal law is actually an unfair or deceptive act or practice under the consumer protection acts of their states. Some courts have held that plaintiffs cannot use the consumer protection statutes in that manner because the legislature’s failure to pass an *Illinois Brick* repealer means that it is against the policy of the state to recognize an indirect purchaser’s claim for damages from the remote seller. *See, e.g., Arnold v. Microsoft Corp.*, 2001 WL 1835377 at *7 (Ky. Ct. App. 2001); *Paltre v. General Motors Corp.*, Index No. 005015/2003, at 14 (N.Y. Sup. Ct. April 21, 2004). Other state courts have permitted such a claim. *See, e.g., Mack v. Bristol Meyers Squibb, Inc.*, 673 So. 2d 100, 109 (Fl. App. 1 Dist. 1996); *Ciardi v. Hoffman – LaRoche, Ltd.*, 762 N.E. 2d 303 (Mass. 2002)

Consumers are also bringing claims for “unjust enrichment” or “restitution” with some degree of success, depending upon the court considering the issue. *Cf. In re Cardizem CD Antitrust Litigation*, 105 F. Supp. 2d 618 (E.D. Mich. 2000) and *In re K-Dur Antitrust Litigation*, 338 F. Supp. 2d 517, at 544-45 (D.N.J. 2004) with *In re New Motor Vehicles Canadian Export Antitrust Litigation*, 350 F. Supp. 2d 160, 209-10 (D. Me. 2004) and *In re Terazosin Hydrochloride Antitrust Litigation*, 160 F. Supp. 2d 1365, 1380 (S.D. Fla. 2001).

It is difficult to identify any real benefit that flows to the indirect purchaser plaintiffs from all this litigation, even if they are able to maintain a claim under a given state law. Generally, the *raison d’etre* of these cases is not injury to the consumer plaintiffs in the first instance, but rather a prior successful antitrust enforcement action by the government or a private party. This is because the federal statutory scheme greatly favors a private plaintiff who waits to sue until after the government has obtained a conviction, a guilty plea or a civil verdict. If a defendant loses an antitrust case in which the government is the plaintiff, the company cannot defend the follow-on civil actions by requiring the private plaintiffs to prove the case on the merits. Section 5(a) of the Clayton Act, 15 U.S.C. §16(a) (2000) provides that a judgment against a defendant in an action brought by the United States is admissible as *prima facie* evidence of the matters actually and necessarily decided by it against the defendant in subsequent private antitrust suits. *See Emich Motors Corp. v. GMC*, 340 U.S. 558, 571 (1951). In addition to the evidentiary issue addressed by this section of the Clayton Act, Section 5(a) specifically preserves the ability of private antitrust plaintiffs to use common law principles of collateral estoppel in certain circumstances to preclude the defendant from contesting issues resolved by the judgment entered upon its guilty plea as a matter of law.

Moreover, the plaintiff loses nothing if it waits for a resolution of the government's case. The statute of limitations for private treble damages actions is tolled during the pendency of a government antitrust suit. This means that plaintiffs who wait and hope that the government will win before filing suit have an enormous advantage in obtaining a recovery. Consider the class action settlements that followed the successful international prosecution of the *Vitamins* cartels. One case has gone to trial so far, and the plaintiff class recovered \$150 million dollars in damages, plus attorneys' fees, without having to prove anything about the underlying antitrust price fixing conspiracy.

In recent years, we have seen that antitrust plaintiffs increasingly utilize the class action device to challenge business conduct under the antitrust laws, even in the absence of a successful government prosecution. Hundreds of antitrust class actions followed the government's successful prosecutions of Microsoft for monopolization, and MasterCard and Visa for civil antitrust violations. These resulted in literally billions of dollars in settlements. We also see plaintiffs filing class actions following proceedings at the Federal Trade Commission. That agency's initiative in examining – and condemning – patent settlements between brand name prescription drug manufacturers and their rival manufacturers of generic drugs have each spawned class action clusters. *In re K-Dur Antitrust Litigation, supra; In re Nifedipine Antitrust Litigation*, MDL No. 1515, Civil Action No. 1:03-mc-223 (RJL).

Consumer plaintiffs now routinely file class actions after an antitrust defendant loses a civil antitrust case even when the original plaintiff was a private party and not the government. *See, e.g., Davis v. United States Smokeless Tobacco Company* (consumer classes in 15 states settling case after defendant lost a \$1 billion jury verdict to a competitor who alleged that the defendant had monopolized the market for moist snuff); *3M Transparent Tape Cases*,

(J.C.C.P.No. 4338) (Superior Court, County of San Francisco) (defendant lost a case to a competitor who alleged that it had monopolized the market for transparent tape). These class action plaintiffs also may have the benefit of preventing the defendant from relitigating the merits of the case it lost through the use of offensive collateral estoppel under *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979).

Despite the fact that the impetus of these cases is not the result of a felt wrong, defendants almost always settle them because the *in terrorem* effect of a treble damages remedy under state antitrust law, or an incidence remedy under a consumer protection statute, is geometrically increased when a plaintiff seeks treble damages on behalf of a class of all consumers injured by an alleged antitrust violation. Historically these settlements have involved coupons or vouchers to the class, and a separate fund for attorneys' fees. Cash settlements to members of indirect purchaser classes are almost unheard of, in part because courts are reluctant to permit consumers to submit claims for cash without proof that they actually purchased the product. This is an important issue because, if consumers who are not actually class members fraudulently claim from a cash fund, their claims dilute the recovery to class members alleged to be actually injured by the antitrust violation.

I am aware of one case in which an individual class member in a state antitrust indirect purchaser class action achieved a meaningful recovery. The class of consumers in 15 states and the District of Columbia whose claims were settled in *Davis v. United States Tobacco Company*, *supra*, received \$48 in coupons towards the purchase of the product, utilizable in \$3 increments. This amounted to a small amount per purchase (\$3 off a 3 can roll of the product, or a dollar a can) but in the aggregate was sufficiently meaningful that approximately 26% of consumers identified as class members in those states (in excess of 150,000 people) registered to receive the

coupons. I believe that this is the result of several factors: (1) the product is regularly consumed, so purchase is not a one time only event; (2) consumers of this product are price sensitive and respond to the defendant's regular promotions in much higher numbers than are typical of other products sold in convenience or grocery stores; and 3) the defendant had agreed to distribute a minimum of 40% of the face value of the coupons to class members and thus undertook to promote the settlement beyond the normal legal notice mechanisms utilized in most class action settlements.

In most cases, however, coupon settlements in indirect purchaser cases have not involved products that are purchased on a recurring basis. Also, the value of each individual coupon is generally so small that the class members do not bother to redeem them. The low redemption rates reflect (1) the ineffectiveness of class notice in all but the most notorious of class action settlements; (2) the low valuation of settlements of this type by putative class members; (3) the complexity of the legal processes required to take advantage of the settlement; (4) the necessity to purchase the product to take advantage of the minor benefit that the settlement provides; and (5) other factors that may be peculiar to the particular lawsuit.

Thus, if the objective measure of benefit to indirect purchaser class members is reflected by their willingness to participate in these settlements, the costs of indirect purchaser litigation far outweigh any benefit to the actual class of plaintiffs who are supposed to be injured by the alleged antitrust violation.

Question 2: The Coordination of State Court Antitrust Actions With Direct Purchaser Actions

Prior to the passage of the Class Action Fairness Act, federal and state courts had already begun to grapple with the necessity of coordinating between the two sets of cases. In the *Compact Disc Minimum Advertised Price Antitrust Litigation*, MDL 1361, for example, the federal and state courts negotiated a “Coordination Order.” The order named the federal case as the lead case for pretrial scheduling and discovery. It was entered in both the federal court in Portland, Maine, the situs of the federal multidistrict litigation, as well as in the California state court where one of the indirect purchaser cases was filed. Under its scheme, federal plaintiffs’ counsel took the lead in discovery matters, and state counsel had to clear any initiatives with them. The order provided, for example, that federal counsel would be the principal questioner at depositions, with state counsel relegated to a supporting role. The same court issued a similar Coordination Order in the *New Motor Vehicles Canadian Export Antitrust Litigation*, MDL 1532. This order has been entered by the courts of a number of states where similar indirect purchaser class actions are pending, including California, Minnesota, New Mexico and Arizona. Similar substantive and procedural coordination occurred in the *Microsoft* litigation.

I expect that the Class Action Fairness Act will essentially eliminate the necessity for such coordination orders in the future. The Act permits defendants to remove indirect purchaser cases to federal court in almost all circumstances. Once the cases are removed, the defendants can use the mechanism of the multidistrict litigation statute, 28 U.S.C. §1407, to transfer the indirect purchaser cases to a single forum, most likely the forum selected by the Judicial Panel on Multidistrict Litigation to adjudicate any previously filed claims.

The provision of a federal forum for indirect purchaser class actions does not impose burdens on consumer plaintiffs. Of course, the federal court sitting in diversity will apply the substantive law of the state in which the claim arose, so the Act should not affect the substantive rights of the plaintiffs at all. The procedural issue is more complex. Whether in federal or state court, the plaintiffs must satisfy the requirements for class certification. Many state class action rules were patterned after Rule 23 of the Federal Rules of Civil Procedure and therefore there should be no substantive difference in the standards for certification in federal or state courts. For example, the Kansas Supreme Court recently issued an opinion on the Kansas version of Rule 23, adopting federal standards for class certification consideration and specifically requiring Kansas trial courts to follow them. *Dragon v. Vanguard Industries*, 277 Kan. 776 (Kan. 2004).

If it is easier to certify a class under a state procedural rule, the question to be answered is whether this circumstance should dictate or affect policy. Plaintiffs' counsel and defense counsel alike are aware that certification of a class greatly heightens the chance of settlement. Thus, certification as a practical matter may preclude a defendant from litigating the merits of the controversy in state court even if it has a meritorious defense to the substantive claim. This question is now largely academic since almost all of these cases will be removed to federal court in any event. Once in federal court, any divergence in state class certification standards should be irrelevant. The federal court applies federal procedural law to removed cases. *Hanna v. Plumer*, 380 U.S. 460, 472 (1965). Thus, the Act will result in more uniformity in the class certification decision in any given controversy.

The provisions of the Class Action Fairness Act relating to the award of attorneys' fees for coupon settlements will also have an effect on indirect purchaser litigation. The Act does not

preclude coupon settlements. However, it provides that attorneys' fees for such settlements must be awarded in relation to the value of the coupons actually redeemed by class members (plus the value of any injunctive relief obtained), or in relation to the time actually expended by class lawyers in litigating the case. This provision, in my opinion, is an example of the law of unintended consequences.

As a result of these provisions, early settlements of class actions are going to be impossible under the Act. Class lawyers will likely be unwilling to settle a case for coupons to class members when their fees will be determined in relationship to the coupons redeemed at some future point in time. Thus, class lawyers will be required to litigate the case solely to have a sufficient investment in it so that the alternate method of awarding fees can be employed.

In the alternative, class lawyers may demand cash as the price of an early settlement. But courts will not approve a settlement that may result in fraudulent claims. So, the only class members who will be able to share in the fund will be those who can provide proof of purchase of the product at issue. In many cases involving consumer products, it is impossible for consumers to provide such proof. If the defendants and the class lawyers want to settle the case for cash, then the settlement fund will likely be distributed on a *cy pres* basis, to charities within the relevant states. This type of distribution will effectively mean that the majority of class members will not obtain any recovery at all from the settlement.

If the cash demand is high enough, the defendants will determine that they have to litigate these cases to a point where they have achieved sufficient leverage over the plaintiffs through successful dispositive motions, or by carving down the damage claims through *Daubert* motions, or the like, to propose a coupon settlement at some later point in the litigation. In either event,

the Class Action Fairness Act has made it more costly and more difficult to settle these cases early in the litigation, even if both the class lawyers and the defendants want to do so.

Question 3: The Continued Viability of *Illinois Brick*

Under our system of jurisprudence, private antitrust enforcement is designed to achieve the dual objectives of deterring wrongdoing and compensating the victims of unlawful conduct. I believe that both objectives are optimally achieved by concentrating enforcement efforts in the hands of direct purchasers unless the underlying case is a criminal price fixing conspiracy. Thus, I believe that Congress should preempt state indirect purchaser actions and provide that they cannot be brought under any state statutory or common law theory. In the alternative, Congress should consider permitting such claims under federal law where the underlying antitrust claim is a criminal offense and therefore a *per se* violation of the Sherman Act. In that event, Congress should repeal *Hanover Shoe* to permit a just apportionment of any overcharge from antitrust violations among the various purchasers in the distribution chain.

Direct purchasers as individual claimants have the largest claims against antitrust violators. This provides them with the incentive to pursue meritorious claims. Whatever complexities are created by their damage models are limited to an assessment of the defendants' pricing and marketing strategies and their own situations. If direct purchasers, those most immediately injured by an antitrust violation, do not sue their sellers, it is because they have concluded that the injury to them is not worth pursuing. This conclusion is not based on the fact that they passed on any overcharge to their own customers; *Hanover Shoe* permits them to recover the full extent of the damage regardless of the extent to which they did so. What is the

policy reason for suggesting that purchasers more remote than the direct purchasers ought to be permitted to come to a different judgment?

Damage claims of remote purchasers are, as the Supreme Court recognized in *Illinois Brick*, inherently far more complex. The prices that consumers pay for products are affected by the individual demand curves and individual pricing and marketing decisions of all the intermediate sellers. What this means is that not only are models intending to measure such effects exceedingly complex, but they cannot be effectively used to prove damages on a class wide basis. Thus, while it may be true that intermediate sellers always pass on overcharges from the suppliers to their customers, the amount of damage that any given consumer may have paid is highly speculative and not likely susceptible to class wide proof. *See, e.g., McCarter v. Abbott Lab.*, No. CV 91-050, slip op. at 6 (Ala. Cir. Ct. April 9, 1993) (the question of “whether the alleged conspiracy resulted in overcharges that were ‘passed on’ to [each] consumer by retailers and others in the chain of distribution . . . will necessarily vary from purchaser to purchaser, from product to product, from time to time, from place to place and from store to store, and will depend upon the price and quantity of the brand, type, form and size of [product] actually bought.”); *Kerr v. Abbott Labs.*, No. 96-002837, 1997 WL 314419, at *2, 1997-1 Trade Cas. (CCH) ¶ 71,776 (D. Minn. Feb. 19, 1997) (denying class certification to indirect purchasers of prescription drugs because “determining whether a consumer had been impacted by the alleged conspiracy would require the examination of myriad transactions at several levels of distribution to determine applicable dates of purchase, prices, generic substitutes available, and the terms of any rebates or discounts applicable at the time of the transaction”); *Peridot, Inc. v. Kimberly-Clark Corp.*, No. MC 98-012626, 2000 WL 673933, at *4, 2001-1 Trade Cas. (CCH) ¶ 72,816 (Minn. Dist. Ct. Feb. 7, 2000) (denying class certification to indirect purchasers of tissue paper

because “[i]n cases where evidence shows that defendant’s alleged price-fixing action was not always ‘passed on’ to all putative class members, however, proof of impact and damages as to each plaintiff becomes too individualized a task to make a class action feasible”); *In re Brand Name Prescription Drugs Antitrust Litig.*, No. 94 C 897, 1994 WL 663590, *7 (N.D. Ill. Nov. 18, 1994) (denying certification to indirect purchasers of prescription drugs because “tracing the alleged overcharges from manufacturers, to wholesalers, to retailers, to consumers presents individualized issues which would dominate this litigation”); *Fischenich v. Abbott Labs, Inc.*, No. MC 94-6868, slip op. at 7-8 (Minn. Dist. Ct. May 26, 1995) (denying certification to indirect purchasers of infant formula and rejecting “assumptions made by plaintiffs regarding the pass through of the price overcharge from direct to indirect purchasers” because “testimony presented by defendants at the evidentiary hearing indicated that all retailers do not pass on 100% of the price overcharge” and “do not base prices solely on a percentage markup or markdown from wholesale cost, but on other competitive factors”); *Harbin v. Johnson & Johnson Vision Prods., Inc.*, No. 94-002872, slip op. at 3 (Ala. Cir. Ct. Sept. 12, 1995) (denying class certification to indirect purchasers of contact lenses and determining that individual questions predominated over common questions because to establish fact of injury “each and every purchaser of defendants’ contact lenses have to be questioned to ascertain that he or she had (a) purchased contact lenses from an Alabamian ECP or retail optical chain, (b) during the applicable time, (c) in some certain amount, and (d) at a certain price”).

If both direct and indirect purchasers are joined in the same proceeding, as they will be under the Class Action Fairness Act, we will see competition and conflict between purchasers at different levels of distribution. Each will claim that they bore the full brunt of any overcharge. Since antitrust defendants cannot claim that their direct purchasers passed on any overcharge

(*Hanover Shoe* is still good law, after all), antitrust litigation under the Act will result in direct purchasers receiving the full amount of any overcharge, while the indirect purchasers can also receive the full amount of the overcharge in the same proceeding, plus the markups of all intervening sellers. And all of this damage is trebled under federal law and under most state antitrust statutes. The recovery in these cases may well run into the due process concerns that the Supreme Court articulated in *State Farm Mut. Auto Ins. Co. v. Campbell*, 530 U.S. 408 (2003). The manageability issues resulting from these conflicting and overlapping damage claims mean that these cases could not be tried to the same jury, as a practical matter.

The fact that only small numbers of consumers, in most cases, participate in indirect purchaser settlements, and that recoveries in such cases are minimal in any event, suggests that the concern that some victims will remain uncompensated if *Illinois Brick* is not repealed should not govern antitrust policy. Rather, damage recovery should be based on deterrence, and on recognition of the practical limitations of courts to manage and adjudicate cases that include multiple layers of remote purchasers.

The only place at all where indirect purchasers might be allowed to maintain a cause of action against their remote sellers is where the underlying antitrust claim is a criminal violation of the federal antitrust laws.² Of course, the underlying claim in *Illinois Brick* itself was a price fixing conspiracy, and I believe in the continued viability of the Supreme Court's concerns as expressed in that opinion as to the complexities of apportioning the overcharge throughout the distribution chain, and the speculative nature of the injury.

² To address the costs and lack of efficiencies in adjudicating claims under different state laws, I would still favor preemption of such claims even in the price fixing context. Indirect purchasers would have a claim, under this proposal, under the Sherman Act against their remote sellers.

However, *Illinois Brick* involved a price fixing agreement on concrete block, and the plaintiffs there purchased not the blocks but the buildings of which they were made. There is certainly an argument that *Illinois Brick's* concerns apply with equal force in that context today, and even more so where the antitrust claims are more nuanced, such as monopolization claims or those involving vertical restraints.

Where the product purchased by the indirect purchasers is the product on which the price was actually fixed by the remote sellers, the policy calculus shifts to favor greater deterrence and more compensation for all injured victims. The apportionment of damages among the various levels in the distribution chain ought to be easier than in circumstances where the antitrust claims are more complex. The Commission might study whether this limited exception to the rule of *Illinois Brick* is both consistent with the fundamental accuracy of that opinion, and with the right of victims of the worst antitrust offenses to compensation for their injuries.

CONCLUSION

It is virtually certain that Congress never envisioned that the antitrust laws would be enforced through the mechanism of class actions. At the time that Congress passed the original antitrust statutes (1890), class actions were employed only in equity actions in which members of a group shared a common interest in having their rights declared by a court or vindicated by an injunction. It was not until 1938 that Rule 23 of the federal procedural rules (and soon, thereafter, some state procedural rules) permitted litigants to proceed in a class action to recover damages. This original class action rule required courts to determine facts relating to the nature of the underlying claim, before permitting a case to proceed as a class action. This process was cumbersome and limited the utility of class actions for dispute resolution. Congress amended

Rule 23 in 1966 to eliminate its complexities. This amendment made it easier for plaintiffs to proceed as a class in a damages action and modern class action practice is the result.

In a recent survey, the Federalist Society found that, between 1988 and 1998, federal class action filings increased 340%. The increase in the filing of antitrust class actions is similar to the overall increase in the utilization of this procedural device. There were 122 antitrust class action filings in the United States in the year ended September 30, 2000 and 249 in the year ended September 30, 2003. Although separate statistics are not available for antitrust class actions alone, the Federalist Society survey found that state class actions filings increased 1315% between 1988 and 1998, and there is ample reason to believe that the increase in state antitrust class actions mirrors the general increase.

The Commission's consideration of this issue, therefore, is hugely important to the future of antitrust class actions in this century as a matter of both policy and procedure. Thank you for the opportunity to contribute to the Commission's consideration of it.